UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN, ELVIRA BUMPUS, RONALD BIENDSEI, LESLIE W. DAVIS, III, BRETT ECKSTEIN, GEORGIA ROGERS, RICHARD KRESBACH, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN, CINDY BARBERA, et al.,

Plaintiffs,

vs.

Case No. 11-CV-562

Members of the Wisconsin Government Accountability Board, each only in his official capacity:
MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE, *and* KEVIN KENNEDY, director and general counsel for the Wisconsin Government Accountability Board,

Defendants.

BRIEF IN SUPPORT OF MOTION TO INTERVENE OF F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, AND SEAN P. DUFFY

INTRODUCTION

F. James Sensenbrenner, Jr., Thomas E. Petri, Paul D. Ryan, Jr., Reid J. Ribble, and Sean P. Duffy (collectively, the "Proposed Intervenor-Defendants" or "movants") seek to intervene in this action in order to protect their interests. The Proposed Intervenor-Defendants are all of Wisconsin's incumbent Republican Members of the United States House of

Representatives.[1] In this lawsuit, the plaintiffs challenge the constitutionality or legality under federal law of 2011 Wisconsin Acts 43 and 44, which relate to the boundaries of Wisconsin's state legislative districts and Congressional districts, respectively. As current Members of Congress from Wisconsin, the Proposed Intervenor-Defendants have a direct interest in ensuring that the constitutionality of the currently effective, fairly, and properly drawn Congressional districts is upheld. As a result, their intervention pursuant to Fed. R. Civ. P. 24(a) or, alternatively, Fed. R. Civ. R. 24(b), is appropriate.

ARGUMENT

I. THE MOVANTS HAVE A RIGHT TO INTERVENE IN THIS ACTION BECAUSE ITS RESOLUTION WILL DIRECTLY AFFECT THEIR RIGHTS.

The Proposed Intervenor-Defendants have a right to intervene in the present action because its disposition may impair or impede their ability to protect their interests. Rule 24(a) of the Federal Rules of Civil Procedure sets forth the requirements for intervention as a matter of right:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The United States Court of Appeals for the Seventh Circuit has interpreted this rule to require granting intervention as a matter of right where (1) the motion to intervene is timely, (2) the

[1] In 2002, the last time a three-judge panel was designated to resolve a complaint regarding Congressional redistricting in Wisconsin, all of Wisconsin's then-incumbent Republican Members of the House of Representatives – including three of the movants here, F. James Sensenbrenner, Jr., Thomas E. Petri, and Paul D. Ryan, Jr. – moved to intervene as parties under Fed. R. Civ. P. 24(a). In granting the motion, the Court found that the intervening Congressmen "ha[d] satisfied the requirements of intervention pursuant to Fed. R. Civ. P. 24(a)." Order Granting Motion to Intervene, *Arrington v. Wendelberger*, No. 01-C-121 (E.D. Wis. Feb. 13, 2002).

intervenors have an interest related to the subject matter of the action, (3) disposition of the action threatens to impair that interest, and (4) the existing parties fail to represent the interest of the intervenors adequately. *See, e.g.*, *Ligas v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007). Each of these elements is satisfied here.

A. This Motion Is Timely.

First, the motion is timely made. Whether a motion to intervene "was made in a timely fashion is determined by reference to the totality of the circumstances." *Shea v. Angulo*, 19 F.3d 343, 348 (7th Cir. 1994). Courts consider factors such as how long the intervenors knew of their interest in the case, the extent of prejudice to the existing parties arising from any delay in bringing the motion, the extent of prejudice to the intervenors if the motion is denied, and any unusual circumstances. *Id.* at 349. Of these, the most important factor is "whether the delay in moving for intervention will prejudice the existing parties to the case." *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435, 439 (7th Cir. 1994) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1916 (2d ed. 1986)).

As the Seventh Circuit has noted, "we do not necessarily put potential intervenors on the clock at the moment the suit is filed or even at the time they learn of its existence." *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) (finding 19-month delay after awareness of action timely for intervention). A review of the brief history of this case shows that this motion is timely. The original complaint was filed on June 10, 2011. At that time, the legislation now challenged had not yet been passed by the Legislature, nor had it even been proposed. Thus, much of the time since the filing of the complaint in June has been spent in presenting and resolving issues of jurisdiction, standing, and ripeness of the claims for review. The existing defendants filed a motion to dismiss on such grounds on June 30. After the Legislature passed 2011 Wisconsin Acts 43 and 44 – but before the Governor approved them – the plaintiffs filed an amended complaint on July 21, which was the subject of a renewed motion to dismiss and briefing on the ripeness issues. The membership of this three-judge panel was

designated less than two months ago. Moreover, only within the last three weeks, on October 21, has the Court resolved the pending issues by denying the motion to dismiss. With this in mind, this motion is certainly timely.

Even more importantly, none of the existing parties can argue that he or she has been prejudiced by delay in bringing this motion for intervention. This litigation is in its infancy. No discovery has been taken by any party, and the stipulated scheduling and discovery order was only filed on November 2. Moreover, the movants are prepared to litigate in conformity with the dates set forth in the November 2 order, including that order's stipulation that a trial commence no later than February 21, 2012. Further, that order includes the statement that the "Court shall not entertain any alternative statewide redistricting plans" at that trial. Consistent with that limitation, the movants support the constitutionality of Act 44, the current Congressional redistricting law, so they will not propose any alternative redistricting plans, unless and until this Court were to find Act 44 invalid.

In contrast, the movants would be substantially prejudiced should this motion be denied. They support Act 44. The plaintiffs have challenged this statute, along with the separate Act 43 that redistricted the Wisconsin Legislature. Under the scheduling and discovery order, this Court will commence a trial no later than February 21 that will determine whether Act 44 will stand. Given the election-year urgencies for action and decision, it is clear that the result of that trial will play a substantial role in determining the course of the elections faced by the movants in 2012. It is highly unlikely that sufficient time will remain after the trial of this case for the movants to bring a separate action to protect their rights. Only in this action can they, as a practical matter, assert and protect their rights.

As further discussed below, the movants are five of the eight representatives of the citizens of Wisconsin in the House of Representatives; therefore, they possess substantial interests in the issues now before this Court. It only recently became clear that this Court would determine the merits of these issues. Should the movants be precluded from now becoming parties to this action, they will be harmed by their inability to protect their interests as

representatives of their respective districts. The movants believe that Act 44 is valid, but a decision undermining the current Congressional redistricting plan would necessarily lead to imposition of a new plan — by judicial decree or renewed legislative action — that would either help or hinder the individual movants' prospects for re-election and, regardless, would necessarily change their campaigning plans and needs. Given the circumstances of the present matter, the motion is timely.

B. The Proposed Intervenor-Defendants Have a Direct and Legally Protectable Interest in this Action.

Under Rule 24(a), those seeking intervention as a matter of right must claim an "interest" in the subject of the action. As the Seventh Circuit has recently noted, open questions remain regarding the proper interpretation of the word "interest." *City of Chicago v. Fed'l Emergency Mgmt. Agency*, No. 10-3544, 2011 U.S. App. LEXIS 20952, at * 9 (7th Cir. Oct. 17, 2011) (noting circuit split on issue of whether intervenor must have Article III-standing where existing parties remain in case); *see also Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995) ("The 'interest' required by Rule 24(a)(2) has never been defined with particular precision."). Despite this uncertainty, courts within this circuit have long found that one seeking to intervene under Rule 24(a)(2) "must demonstrate a 'direct, significant legally protectable interest.'" *Clorox Co. v. S.C. Johnson & Son, Inc.*, 627 F. Supp. 2d 954, 961 (E.D. Wis. 2009) (quoting *Am. Nat'l Bank v. City of Chicago*, 865 F.2d 144, 146 (7th Cir. 1989)). The movants have such an interest.

Recent cases have stressed the reason for this limitation: "the effects of a judgment in or a settlement of a lawsuit can ramify throughout the economy, inflicting hurt difficult to prove on countless strangers to the litigation. Remoteness of injury is a standard ground for denying a person the rights of a party to a lawsuit." *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009); *see also City of Chicago v. Fed'l Emergency Mgmt. Agency*, 2011 U.S. App. LEXIS 20952, at * 11 (discussing remoteness as an essential limit on scope of

intervention as a matter of right). There is no remoteness problem here. The universe of individuals with an interest like that of the movants is necessarily limited – by the current population distribution in the United States and Article I, section 2 of the Constitution, as amended by the Section 2 of the Fourteenth Amendment – to a possible total of eight persons who represent Wisconsin in the House of Representatives. No great flood of litigants threatens to intervene in this action should this Court recognize the particular interests of the movants here.

Instead, the present litigation takes direct aim at those specific seats currently held by the movants. Their interests will be directly, rather than tangentially, affected by its outcome. Likewise, the significance of the interests at stake for the movants cannot be overstated. This Court's resolution of this case will determine whether the current legislatively-drawn districts will stand, or whether the movants will need to make re-election and campaigning decisions based upon some differently drawn lines. The redistricting process has had potential or actual effects upon — and depending on the decisions of this Court will continue to affect — the movants' eligibility to seek re-election from their current districts, as well as their decisions on how and when to campaign and how and when to seek volunteer and voter support. Finally, the decisions rendered in this action will inevitably have an effect on the likelihood of success of the movants in elections to be held in 2012 and thereafter. In short, this case has thrown into some doubt who the respective movants' constituents will be for purposes of the 2012 elections, as well as their ability to continue to serve those constituents in the House beginning in 2013. These direct and substantial interests must be legally protected by the Court in this action.

C. The Proposed Intervenor-Defendants' Ability to Protect Their Interests Would Be Impaired or Impeded in Their Absence.

As to Rule 24(a)'s third requirement, the nature and urgency of redistricting litigation show that disposition of this matter in the movants' absence would impair or impede their ability to protect the interests discussed above. An interest is considered impaired under Rule 24(a) "when the decision of a legal question would, as a practical matter, foreclose the

rights of the proposed intervenor in a subsequent proceeding." *Shea*, 19 F.3d at 347. The movants are current Members of the House who support Act 44's duly-enacted redistricting plan, and the amended complaint takes aim at the viability of the movants' wishes to continue to serve the citizens in their respective districts. The decision rendered in this action will necessarily have a substantial impact upon their interests. Given the inexorability of the election calendar that impels this Court to act with dispatch, if the movants' voices as to the constitutionality and propriety of Act 44 are not heard in this action, they may well never be heard. Thus, if this motion to intervene is denied, their ability to protect their interests judicially will be foreclosed.

D. The Proposed Intervenor-Defendants' Interests Are Not Adequately Represented by the Existing Parties to this Action.

Finally, while the claims asserted in this action have made clear that the movants' interests are in jeopardy, the briefing of certain preliminary issues by the parties and the Court's decision to deny the defendants' motion to dismiss have highlighted the failure of any of the current parties to represent the movants' interests adequately. Those seeking intervention as of right must only show "that the representation 'may be' inadequate and 'the burden of making that showing should be treated as minimal.'" *Ligas*, 478 F.3d at 774 (quoting *Trbovich v. United Mine Works of America*, 404 U.S. 528, 538 n.10, 92 S. Ct. 630 (1972)).

This minimal burden is easily met here. None of the existing parties are incumbent Members of Congress; in fact, none appear to be incumbent legislators or prospective candidates for legislative office in either the federal or the state government. The plaintiffs are 15 individual Wisconsin citizens who allege that they fear negative effects from the adopted legislative and Congressional boundaries. The existing defendants are the six members of the Wisconsin Government Accountability Board, in their official capacities only, and the director and general counsel of the GAB. These defendants hold positions created by state law, were appointed members of the state's election-supervising agency by the current or the previous Governor, and were confirmed by one of the houses of the Legislature. None of these existing

parties represents the stated, substantial interests of the movants: they are not concerned with which districts the movants will reside in at the time of the 2012 election, and they are not concerned with the effects of the present litigation on the viability or logistics of incumbent Congressional candidates' re-election campaigns.

Rather, each of the existing parties has interests significantly different from, or opposed to, the movants'. No one is better positioned than the movants to determine the adequacy of this representation. As courts and commentators have noted, "[t]here is good reason in most cases to suppose that the applicant is the best judge of the representation of his own interest and to be liberal in finding that one who is willing to bear the cost of separate representation may not be adequately represented by the existing parties." *Cooper Technologies, Co. v. Dudas*, 247 F.R.D. 510, 515 (E.D. Va. 2007) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1908 (2d ed. 1986)). Here, the existing parties are simply interested in different things than the movants are interested in. They cannot be expected to pursue arguments protecting the movants' interests as vigorously as the movants themselves will pursue them, once they are made parties.

Indeed, the proceedings to date have focused almost exclusively on the state-legislative redistricting issues arising from Act 43, while virtually ignoring the Congressional redistricting issues under Act 44 that affect the movants' interests. This is unsurprising. The existing pleadings, as well as the briefing on the motions to dismiss, strongly suggest that the focus and passions of the existing parties are directed mostly at the redistricting of Assembly and Senate districts, with substantially less attention being given to the comparatively simple claims based upon the Congressional redistricting legislation.

Thus, it seems likely, based on the existing parties' positions to date, that the Congressional redistricting issues could be dragged along through protracted litigation without any party satisfactorily addressing the interests and concerns of the movants, which go to the core of their representation of Wisconsin citizens in Congress.

II. ALTERNATIVELY, THE COURT SHOULD ALLOW THE PROPOSED INTERVENOR-DEFENDANTS TO INTERVENE PERMISSIVELY UNDER RULE 24(b).

Even if the Court were to determine that the movants are not entitled to intervene as of right, they should be permitted to intervene permissively, under the terms of Rule 24(b)(1): "On timely motion, the court may permit anyone to intervene who: . . . (B) has a claim or defense that shares with the main action a common question of law or fact." Like a motion under Rule 24(a), a Rule 24(b) motion must be timely made. However, the inquiry as a whole is simpler than under Rule 24(a)(2), and inquiry into "interest" and "impair or impede" requirements is not necessary. *Flying J*, 578 F.3d at 573. Instead, in considering whether to grant a motion for permissive intervention, courts look for something *similar* between the would-be intervenor and at least one existing party: "In the typical permissive-intervention case, a third party wants to join a lawsuit to advocate for the same outcome as one of the existing parties." *Bond v. Utreras*, 585 F.3d 1061, 1070 (7th Cir. 2009) (citing *Horne v. Flores*, 129 S. Ct. 2579, 2591 (2009)).

A. The Motion to Intervene Is Timely.

For the reasons already discussed, this motion is timely.

B. The Proposed Intervenor-Defendants Seek to Advance Common Questions of Fact and Law.

While seeking to protect distinct interests unique to their positions as incumbent Members of Congress, the movants would advocate one or more of the same affirmative defenses advanced by the existing defendants in their Answer and Affirmative Defenses filed on November 4. As stated above, the movants would advocate for the constitutionality and validity of Act 44, the Congressional redistricting legislation passed by the Legislature. The movants' proposed Answer-in-Intervention would, like the answer filed by the existing defendants, seek to

demonstrate the plaintiffs' failure to show any basis for a holding that Act 44 is unconstitutional. The interests of the movants differ significantly from those of the existing defendants, and they would advocate and stress different and additional arguments. Nevertheless, the underlying facts would be identical to those raised by the existing defendants, and the movants' legal theories are likely to be closely connected with those underlying the defendants' answer.

C. Permissive Intervention Would Not Cause Any Delay or Prejudice.

Granting permission to the movants to intervene under Rule 24(b) will not cause delay or prejudice to any existing party. The movants are fully aware that time is of the essence for the parties and the Court, and time's inexorable nature has the same effect upon them and their interests. This Court has only recently decided preliminary issues of ripeness, no discovery has been taken, and a schedule has only just been set. The movants are prepared to litigate in conformity with the existing schedule. Moreover, they are filing a single motion to intervene and intend to litigate as if they were a single intervenor, so that their involvement will not prove unwieldy. *City of Chicago v. Fed'l Emergency Mgmt. Agency*, 2011 U.S. App. LEXIS 20952, at *15 (granting intervention to six airlines who intended to act as single litigant). No delay whatsoever will befall any of the parties by reason of movants' involvement, nor will the parties suffer any prejudice to their rights.

Further, judicial economy considerations counsel in favor of granting the motion. Allowing intervention will assure that all interested parties are gathered in one action and that all issues will be properly and fully addressed. Both the Court and the public would benefit from the movants' involvement as to the issues arising from the Amended Complaint relating to Act 44. The movants do not seek to become involved in this action in any way with respect to Act 43.

CONCLUSION

Proposed Intervenor-Defendants Sensenbrenner, Petri, Ryan, Ribble, and Duffy respectfully request that the Court enter an order granting their motion to intervene and permitting them to file their proposed answer-in-intervention.

FOLEY & LARDNER LLP

Dated this 10th day of November, 2011.

s/ Thomas L. Shriner, Jr.

Thomas L. Shriner, Jr.
Wisconsin Bar No. 1015208
Kellen C. Kasper
Wisconsin Bar No. 1081365
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5306
414.297.5601 (TLS)
414.297.5783 (KCK)
414.297.4900 (facsimile)

Attorneys for Proposed Intervenor-Defendants F. James Sensenbrenner, Jr., Thomas E. Petri, Paul D. Ryan, Jr., Reid J. Ribble, and Sean P. Duffy